Public Prosecutor v Muslikhodin Mualim

HIGH COURT (SANDAKAN) — CRIMINAL TRIAL NO S47–01 OF 2004
LINTON ALBERT J
19 JUNE 2006

Criminal Procedure — Prosecution — Gap in evidence — Failure to call witnesses, whether caused gap in prosecution case

Evidence — Conflicting testimony — Judge's preference for one witness as against the other — Whether evidence of prosecution witnesses incredible

The accused was charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The accused was one of five persons who were in a vehicle that was stopped by police personnel at the police roadblock on 25 September 2003. The roadblock was manned by PW2 and six others who were on duty then. The accused was seated immediately behind the front passenger. The others in the vehicle were, inter alia, PW5 who was the driver and his wife PW6. The other passengers did not give evidence. After the initial checking of the personal identification documents of each of them at the roadblock, PW5 was instructed to drive to and stop at a well-illuminated space in front of a coffee shop called 'Restoran Sri Sentosa'. According to PW2, after the vehicle had stopped in front of 'Restoran Sri Sentosa' he saw the accused who was wearing a black jacket alight from the vehicle, move towards the front and throw something in front of the vehicle. Thereafter, the accused immediately turned back towards PW2 and he then conducted a search on the accused after which police personnel PW3 found the black plastic which the accused had thrown. Upon examination by PW2, it was found that there were five plastic packets containing crystalline material suspected to be 'syabu' in the black plastic. PW2 also testified that apart from him, police personnel PW3 and PW4 saw the accused throw the black plastic.

Held, acquitting the accused:

The evidence given by PW2, PW3 and PW4 was inherently incredible. In the first place, it would have been natural to expect PW2 to immediately retrieve the thing which he had seen the accused throw in front of the front left tyre of the vehicle. Instead, PW2 had nonchalantly remained rooted to where he was, waited for the accused to turn back towards him and then conduct a body search on the accused, totally oblivious to what the accused had done. The evidence of PW3 and PW4 that both of them heard the sound of plastic being thrown, or dropped after noting that the accused had bent down towards the front of the vehicle was equally startling. Judging from the weight of the black plastic together with its contents, PW3 and

PW4 would have to be endowed with a supernatural sense of hearing to have been able to hear the sound produced by the plastic thrown by the accused in a bending position from where they were, several feet away from the other side of the vehicle. Also the evidence of PW5 and PW6 established that the accused did not bring anything along with him and there was no evidence to show that he had anything hidden in his person let alone the black plastic. No less damning to the version given by PW2, PW3 and PW4 was the fact that PW2 found it necessary to ascertain to whom the black plastic belonged by asking all the occupants of the vehicle when they were detained at the police pondok, even after its discovery in the way alleged by PW2, PW3 and PW4. It was also not improbable that the black bag could have been thrown out of the vehicle just before or simultaneously with the vehicle coming to a halt in front of 'Restoran Sri Sentosa' by anyone other than the accused considering the fact that PW2, PW3 and PW4 were variously behind or at the side of the vehicle when it came to a halt at 'Restoran Sri Sentosa'. The other two passengers who sat with the accused at the back seat of the vehicle could have shed light on the accused's alleged custody and control of the black plastic but were not produced as witnesses which thus left a gaping hole in the case for the prosecution (see para 13).

[Bahasa Malaysia summary

Tertuduh didakwa atas kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Tertuduh adalah salah seorang daripada lima orang yang didapati berada dalam kenderaan ketika ditahan oleh pegawai polis di dalam satu sekatan jalan pada 25 September 2003. Sekatan jalan tersebut dikendalikan oleh PW2 bersama enam orang yang bertugas. Pada ketika itu tertuduh duduk di belakang tempat duduk penumpang hadapan. Mereka yang lain di dalam kenderaan tersebut adalah PW5 iaitu pemandu dan isteri beliau iaitu PW6. Penumpang yang lain tidak memberikan keterangan. Selepas pemeriksaan awal ke atas pengenalan diri setiap seorang daripada mereka ketika sekatan jalan tersebut. PW6 telah diarahkan untuk memandu dan berhenti di tempat yang terang di hadapan sebuah kedai kopi yang dikenali sebagai 'Restoran Sri Sentosa'. Menurut PW2, selepas kenderaan tersebut diberhentikan di hadapan 'Restoran Sri Sentosa', beliau melihat tertuduh yang memakai jaket hitam turun daripada kenderaan, bergerak ke hadapan dan membuang sesuatu di hadapan kenderaan tersebut. Selepas itu, tertuduh segera kembali ke arah PW2 dan beliau telah memeriksa tertuduh selepas pegawai polis PW3 menjumpai plastik hitam yang dibuang oleh tertuduh. Hasil pemeriksaan oleh PW2, mendapati lima paket plastik yang mengandungi bahan jernih yang disyaki adalah 'syabu' di dalam plastik hitam tersebut. PW2 juga memberikan keterangan bahawa selain daripada beliau, pegawai polis PW3 dan PW4 juga ada melihat tertuduh membuang plastik hitam tersebut.

Diputuskan, tertuduh dibebaskan:

Keterangan yang diberikan oleh PW2 dan PW3 adalah sememangnya sukar dipercayai. Pada peringkat awalnya, adalah menjadi kebiasaan bagi menjangka PW2 untuk segera mendapatkan kembali barang yang beliau lihat dibuang oleh tertuduh di hadapan sebelah kiri tayar kenderaan. Malahan, PW2 tidak bergerak dari tempatnya dan menunggu tertuduh kembali kepadanya dan kemudian menjalankan pemeriksaan badan terhadap tertuduh, sama sekali tidak sedar akan tindakan yang

dilakukan oleh tertuduh. Keterangan PW3 dan PW4, yang mana kedua-duanya mendengar bunyi seperti plastik yang dibuang, atau dijatuhkan selepas mendapati tertuduh menuju ke arah hadapan kenderaan adalah sama-sama mengejutkan. Berdasarkan kepada berat plastik hitam bersama-sama dengan kandungannya, PW3 dan PW4 seperti memiliki deria pendengaran yang luar biasa dengan dapat mendengar bunyi yang dikeluarkan oleh plastik yang dibuang oleh tertuduh dalam keadaan membongkok daripada tempat mereka berada, beberapa kaki bersebelahan daripada kenderaan tersebut. Daripada keterangan PW5 dan PW6 juga, menunjukkan bahawa tertuduh tidak membawa apa-apa bersamanya dan tiada bukti yang menunjukkan beliau menyembunyikan sendiri plastik hitam tersebut. Adalah sedikit pun tidak merosakkan versi yang diberikan oleh PW2, PW3 dan PW4, dengan fakta bahawa, PW2 mendapati adalah penting untuk memastikan kepunyaan siapa plastik hitam tersebut dengan menyoal kesemua yang menaiki kenderaan tersebut semasa mereka ditahan di pondok polis, walaupun selepas menemuinya sebagaimana cara yang dinyatakan oleh PW2, PW3 dan PW4. Adalah dipercayai juga bahawa, beg hitam yang dikatakan dibuang keluar daripada kenderaan sejurus sebelum atau serentak dengan kenderaan yang hampir terhenti di hadapan 'Restoran Sri Sentosa' oleh sesiapa sahaja selain daripada tertuduh dengan mengambil kira fakta yang PW2, PW3 dan PW4 berasingan di belakang atau di sisi kenderaan tersebut yang dihentikan di 'Restoran Sri Sentosa. Dua penumpang yang lain yang duduk bersama-sama dengan tertuduh di tempat duduk belakang kenderaan tersebut yang boleh merangkan keadaan atas tertuduh yang didakwa memiliki dan menguasai plastik hitam tersebut tetapi tidak dipanggil sebagai saksi yang meninggalkan ruang di dalam kes pendakwaan (lihat perenggan 13).]

Notes

For a case on gap in evidence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2786.

For a case on judge's preference for one witness as against the other, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 831.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301 (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685
Pendakwa Raya v Che Saufi bin Kadir [2005] 6 MLJ 156

Legislation referred to

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a)

Gan Peng Kun (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Tn Hj Rahim Abdullah (Rahim Abdullah & Co) for the accused.

Linton Albert J:

[1] The accused, Muslikhodin Mualim is charged for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The charge reads:

That you, on the 25th day of September 2003 at about 4.20am at KM52 Sandakan, in tine District of Sandakan, in the State of Sabah, did on your own behalf traffic in a dangerous drug to wit 196.78g of Methamphetamine and that you have thereby committed an offence under s 39(b)(1)(a) of the Dangerous Drug Acts 1952 (Act 234) and punishable under s 39B(2) of the same Act.

[2] The accused was one of five persons who were in a vehicle bearing registration number SAA5665C which was stopped by police personnel at the police roadblock at kilometer 52, Sandakan at about 4.20am on 25 September 2003. The roadblock was manned by detective Lance Corporal Martiannus Misak (PW2) and six others who were on duty then. The accused was seated immediately behind the front passenger. The others in the vehicle were Ivan Yapp, (PW5) the driver, his wife Shirley Lee (PW6), Redzuan Chong who sat next to the accused at the back seat and sitting next to Redzuan Chong was his wife Magdalena @ Maimunah. Redzuan Chong and Magdalena @ Maimunah did not give evidence. After the initial checking of the personal identification documents of each of them at the roadblock, PW5 was instructed to drive to and stop at a well-illuminated space in front of a coffee shop called 'Restoran Sri Sentosa'. Some of the police personnel were in tow as the vehicle proceeded towards 'Restoran Sri Sentosa'.

[3] According to PW2, after the vehicle had stopped in front of 'Restoran Sri Sentosa' he saw the accused who was wearing a black jacket alight from the vehicle, move towards the front and throw something in front of the vehicle. PW2 saw what he had described when he was still behind towards the left side of the vehicle and went on to describe how the accused immediately turned back towards him after throwing the thing and he then conducted a search on the accused after which Lance Corporal Nizam bin Abdul Aziz (PW3) called out to him and informed him that they had found the thing which the accused had thrown. The thing which the accused had thrown in front of the vehicle was a black plastic and upon examination by PW2, it was found that there were five plastic packets inside each of which contained what appeared to be crystalline material suspected to be 'syabu'. The other four who remained in the vehicle were subsequently searched and so was the vehicle but nothing incriminating was discovered. They were all arrested together with the accused and all five were taken to the police pondok in the vicinity for further action. PW2 also testified that apart from him, three out of the other police personnel saw the accused throw the black plastic, namely Lance Corporal Samuel John, PW3 and Lance Corporal Rozeanah Panus (PW4). In his cross-examination, he further testified that at the time the black plastic was thrown he heard these three alleged eye-witnesses almost simultaneously shout out: 'Dia buang barang' — he threw something. PW2 demonstrated how the accused bent down before he threw the thing near the front tyre. PW2 was at that time five to six feet behind the vehicle and towards the left side from where the accused alighted and the vehicle door had been closed. Lance Corporal Samueal John was beside PW2.

[4] PW3 testified that after the vehicle had really stopped and its engine not running in front of 'Restoran Sri Sentosa', he saw the accused try to come out of the vehicle by opening the left back door and saw him move towards the front, then bend down and subsequently PW3 heard the sound of a plastic bag dropping on the

ground near the left front tyre. PW3 also clearly heard PW4 saying 'dia buang barang, dia buang barang'— 'he threw something, he threw something'. Together with PW4, he then went towards the vehicle and he then saw a black plastic on the ground next to the front tyre on the left of the vehicle. PW4 then made a small tear on the plastic bag inside which he saw small plastic packets containing crystalline material which he suspected to be 'syabu'. PW4 then stood in front of the black plastic and called PW2 who then examined the contents of the black plastic bag. All the five occupants of the vehicle were subsequently escorted to the police 'pondok' at the roadblock. At the time he saw the accused try to get out of the vehicle, he was next to the driver seat door with PW4 beside him. He did not, however, see the accused hold any object. PW3 saw the accused turning back towards the back door and then stopped by PW2 who conducted a search on him.

[5] PW4 testified that when the vehicle stopped in front of 'Restoran Sri Sentosa' she saw the accused come out of the vehicle and move forward towards the left front tyre. She then heard the sound of plastic being thrown, after which she saw PW3 pick up something and heard PW3 inform PW2 that he had found something.

[6] PW5 and PW6 who was then his fiancee had planned to go to Tawau and thence to Sandakan by renting the vehicle which was only available on the night of 24 September 2003. They had originally planned to take only Redzuan Chong along with them for the trip but when they almost reached Inanam to pick up Redzuan Chong they were told by Redzuan Chong that his wife Magdalena @ Maimunah and another person who turned out to be the accused also wanted to join them and so the three of them were picked up by PW5 and PW6 for the trip to Tawau. PW5 testified that the accused was dressed in black, black shoes, black jeans and black jacket which was zipped up to the neck but PW5 did not see the accused bringing anything with him. They made two stops along the way, once at Kundasang to have a light meal and at Telupid as the vehicle was running short of petrol. At 'Restoran Sri Sentosa', PW5 alighted from the vehicle and approached one of the policemen and asked him whether there was any problem and by then everyone except PW6 had already come out of the vehicle. PW5 saw PW2 and PW3 in front towards the left of the vehicle and it was then that PW2 shouted: 'Tahan mereka semua, siapa yang cuba lari tembak sahaja' — 'arrest all of them whoever tries to run, just shoot'. They were all subsequently taken to the police quarters where they were asked to sit in front of PW2 who took out the five packets containing crystal-like substance from the black plastic and asked them to whom those were. Later, they were asked to take a urine test.

[7] PW6 testified that PW5 was asked to stop at 'Restoran Sri Sentosa' after their personal identification documents were checked at the checkpoint. There, they were all asked to get out of the vehicle. The accused was the first to get out and he went towards the front left of the vehicle and the police carried out a body search on the accused. After that they were all detained and taken to the police pondok.

[8] The crystalline material in the five packets found inside the black plastic was sent for analysis. Shaari bin Desa (PW1) testified that he carried out an analysis and

A came to the conclusion that they constituted 196.78g of methamphetamine. The report prepared by PW1 on his analysis was tendered and admitted into evidence.

[9] So much for the evidence adduced at the end of the prosecution case. B Section 180 of the Criminal Procedure Code provides:

(i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(ii) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

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(iii) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[10] What has to be considered is stated in the judgment of Augustine Paul JCA D in the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301at pp 315–316:

… the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

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… The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If here is any such doubt there can be no prima facie case.

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[11] The prosecution is invoking s 37(da) of the Dangerous Drugs Act 1952 which states:

any person who is found possession of —

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(xvi) 50 grammes or more in weight of Methamphetamine; otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

H **[12]** In order to set up a prima facie case it is essential for the prosecution to establish that the accused was 'found in possession' of the methamphetamine in the five plastic packets found in the black plastic. As to what is meant by 'possession', I need only refer to the judgment of VT Singham J in *Pendakwa Raya v Che Saufi bin Kadir* [2005] 6 MLJ 156at p 190:

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The word 'possession' implied a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise of everyone and a determination to exercise that physical power on one's own behalf. It implied dominion and consciousness in the mind of the person having 'possession' that he not only has such dominion but also that he can exercise it (see *Yee Ya Mang v PP* [1972] 1 MLJ 120).

[13] The prosecution is relying on circumstantial evidence to establish that the accused had physical custody and control over the black plastic in which the five packets containing the methamphetamine were found. PW2 who saw the accused get out of the car did not at anytime see the accused hold the black plastic as he alighted from the car. He only saw the accused bend down and throw something in front of the left tyre of the vehicle. PW3 and PW4 only heard the sound of plastic dropping on the ground. I find the evidence given by PW2, PW3 and PW4 to be inherently incredible. In the first place, it would have been natural to expect PW2 to immediately retrieve the thing which he had seen the accused throw in front of the front left tyre of the vehicle. It must be remembered that PW2's suspicion had already been aroused when PW5 was instructed to drive the vehicle to where it stopped in front of 'Restoran Sri Sentosa'. Instead, PW2 had nonchalantly remained rooted to where he was, waited for the accused to turn back towards him and then conduct a body search on the accused, totally oblivious to what the accused had done, and the shouts of PW3, PW4 and Lance Corporal Samuel John that the accused had thrown something. The evidence of PW3 and PW4 that both of them heard the sound of plastic being thrown, or dropped after noting that the accused had bent down towards the front of the vehicle is equally startling. Judging from the weight of the black plastic together with its contents, PW3 and PW4 would have to be endowed with a supernatural sense of hearing to have been able to hear the sound produced by the plastic thrown by the accused in a bending position from where they were, several feet away from the other side of the vehicle. I am fortified in my conclusion by the evidence of PW5 and PW6 which established that the accused did not bring anything along with him and despite the two stops made at Kundasang and Telupid there was no evidence to show that he had anything hidden in his person let alone the black plastic. No less damning to the version given by PW2, PW3 and PW4 is the fact that PW2 found it necessary to ascertain to whom the black plastic belonged by asking all the occupants of the vehicle when they were detained at the police pondok, even after its discovery in the way alleged by PW2, PW3 and PW4. It was also not improbable that the black bag could have been thrown out of the vehicle just before or simultaneously with the vehicle coming to a halt in front of 'Restoran Sri Sentosa' by anyone other than the accused considering the fact that PW2, PW3 and PW4 were variously behind or at the side of the vehicle when it came to a halt at 'Restoran Sri Sentosa'. Redzuan Chong and Magdalena @ Maimunah who sat with the accused at the back seat of the vehicle could have shed light on the accused's alleged custody and control of the black plastic but were not produced as witnesses which thus left a gaping hole in the case for the prosecution. In the circumstances*Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 CLJ 460 is relevant. Nik Hashim FCJ had this to say at p 468:

> in order to invoke the presumption of trafficking under s 37 (da) of the Act, there must be an express affirmative finding of possession as understood in criminal law, and not a legal presumption of possession and knowledge as provided for under s 37(d). The presumption of possession and knowledge under s 37(d) cannot be used to invoke the presumption of trafficking under s 37(da) of the Act.

[14] In the light of the principles set out in the authorities referred to and reproduced above, I am satisfied that on the totality of the evidence before the court, the prosecution has failed to establish a prima facie case. I might as well add,

in conclusion, that the reasoning applied in *Pendakwa Raya v Che Saufi bin Kadir* is no less applicable here. VT Singham J said at p 192:

> Therefore, if the court finds that there are flaws which has materially affected the truth of the prosecution case or cast doubt on the prosecution's case, those flaws must be resolved in the accused's favour. The cumulative effect of the flaws and material gaps in the prosecution case has left too much for speculation and is equally consistent with the innocence of the accused and capable of other inferences as stated above in the grounds of judgment (see *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306).

[15] The accused is accordingly discharged and acquitted without the need to call upon him to enter his defence. Order accordingly.

Accused acquitted.

Reported by Loo Lai Mee